IN THE MATTER OF THE	)	**ARBITRATION BETWEEN**
	)	
	)	
	)	FMCS FILE NO: 03-11035
Los Angeles County	)	COUNTY CASE #B03-004
Metropolitan Transportation	)	
Authority (MTA)	)	
	)	
	)	GRIEVANCE:
and	)	Discharge
	)	
	)	
Local 1315 Transportation	)	
Communications	)	GRIEVANT: Travis Hawkins
International Union (TCU)	)	Badge No. 27091

OPINION AND AWARD

ARBITRATOR: DANIEL R. SALING, Esq.

AWARD DATE: SEPTEMBER 17, 2003

APPEARANCES FOR THE PARTIES

AGENCY: Denice C. Findlay
Los Angeles County Transportation Authority
One Gateway Plaza
Mail stop: 99-14-2
Los Angeles, California 90012

UNION: Raymond G. Huffer
Division Chairman
TCU Local 1315
2903 Lynrose Drive
Anaheim, California 92804

WITNESSES:

For the Union:

Raymond Huffer
Travis Hawkins

For the Agency:

Thomas Longsden
Diane Bojorquez

PROCEDURAL HISTORY

The Los Angels County Metropolitan Transportation Authority is hereinafter referred to as the "Agency." Local 1315 of the Transportation Communications International Union (TCU) is hereinafter referred to as the "Union". Mr. Travis Hawkins is hereinafter referred to as the "Grievant."

The Grievance in question, FMCS Number 03-110354, also entitled County B03-004, was submitted to the Agency in writing on or about January 9, 2003, (JX 3) and thereafter processed in accordance with provisions of the Master Agreement, between the Agency and Union first effective July 1, 2000 through June 30, 2003, hereinafter referred to as the "Agreement." (JX 1) The Grievance was filed following a hearing with the Agency on December 10, 2002, on the charge of gross misconduct which resulted in the Grievant being discharged effective December 16, 2002.(JX 2) Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Articles 31, and 32 of the Agreement. Using the services of the Federal Mediation and Conciliation Service (FMCS), Daniel R. Saling was appointed as Arbitrator by the Federal Mediation and Conciliation Service (FMCS) on June 27, 2003.

An arbitration hearing was held at the Los Angeles County Metropolitan Transportation Authority's office at Gateway Plaza in Los Angeles, California, on August 6, 2003. During the course of the hearing both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing and were duly sworn.

A stenographic record and transcript of the arbitration hearing was prepared by and under the direction of the parties. The Arbitrator received a copy of the transcripts on or about August 27, 2003.

The parties elected not to file post-hearing briefs and made closing statements at the close of the hearing.

The parties were able to stipulate that the grievance and arbitration were timely and properly before the Arbitrator. Further the parties were able to stipulate that the Arbitrator had authority to render a final and binding decision in this matter.

GRIEVANCE ISSUES TO BE RESOLVED

The parties agreed that the issues to be resolved in this arbitration were to determine if the Grievant had been discharged for proper cause, and if so, what is the proper remedy?

FACTUAL BAKGROUND

In June of 2002, Grievant was observed exiting the Employer's parking structure without paying for parking. His conduct was reported to Mr. Thomas Longsden, MTA Communication Manager, by Mr. Brian Soto, the director of building services. Mr. Soto observed the Grievant follow another vehicle out of the parking lot by going through the parking gate without paying the appropriate parking fees. Having observed the vehicle leaving without paying the parking fees, Mr. Soto gave a description of the vehicle and the name of the registered owner to Mr. Longsden.

Following the receipt of the vehicles description and the name of the registered owner, Mr. Longsden contacted the Grievant and asked him what type of vehicle he drove, the Grievant's description of his vehicle matched the one given by Mr. Soto. Mr. Lognsden then asked the Grievant if he had evaded the parking fees on the evening in question and the Grievant indicated that he had not paid the parking fees that evening because he did not have the money to pay for the parking fees.

Mr. Longsden then directed the Grievant to contact the parking company that managed the parking structure and to make arrangements to pay the missed parking fees. Mr. Longsden encountered the Grievant a few days later and asked if the parking fees had been paid, and was told that they had not yet been paid. Mr. Longdens then directed the Grievant to make the payment and to bring the receipt to him verifying that the payment

had been made. The Grievant did make the payment and did take the receipt to Mr. Longsden as he had been instructed to do.

There were no charges filed against the Grievant at the time of this incident. Further, there was no documentation of the event nor was there progressive discipline administered as a result of the June violation of the parking fees.

Subsequent to the June incident, the Grievant was once again observed exiting the parking structure without paying the parking fees. On November 25th and 26th, 2002, Diane Bojorquez, a passenger service officer, observed three vehicles exiting the parking structure, all at the same time, with the lead vehicle using her parking card key and the other two cars racing through the gate without paying the parking fee. The lead car was driven by Jennifer Portillo; the second vehicle was driven by John Evangilista; and the third vehicle was driven by the Grievant.

Ms. Potillo was disciplined by being given a written reprimand; Mr. Evangilista was disciplined by being given a five-day (5) suspension; and the Grievant was discharged. (TR 25: 3-23) The Agency stated that the reason Ms. Potillo was given only a written reprimand was because of her good employee record, that this was her first offense, and that she had no choice in the matter. The reasons given for Mr. Evangilista's a short-term suspension by the Agency were that this was his first offense, his conduct was preplanned and purposeful, and that he had taken advantage of Ms. Potillo. The Grievant was discharged based upon his previous parking fee violation in June of 2002 and because he

had allegedly violated a management directive not to evade parking fees following the June incident. The Grievant , prior to his meeting with Ms. Bojouquez and before his discharge, went to the parking office and paid for the missed parking fees of November 25th and 26th, 2002, in an attempt to mitigate the damages. (TR 43: 17-25, TR 44: 1-7)

AGENCY POSITION

In June of 2002, the Grievant was observed exiting the Employer's parking structure without paying for parking. The Grievant was counseled by Mr. Longsden, Communications Manager, and directed to pay the fees and to discontinue such practices in the future.

On November 25th and 26th, 2002, the Grievant was once again observed leaving the parking structure without paying the parking fees. The Grievant was charged with gross misconduct and discharged from the MTA.

It is the position of the MTA that the Grievant had been provided with adequate warning when he was counseled in June of 2002 and directed to discontinue such practices. The MTA believes that the Grievant's conduct to violate a direct management directive to cease evading parking fees constitutes insubordination and a violation of Agency rules. Further, The Grievant's conduct created an unsafe condition within the parking facility

that could have resulted in injury or death to other workers or to visitors to the office complex.

The MTA believes that the Grievant had a number of transportation alternatives to the work site that would not have required him to use the parking facility, but that he intentionally chose to drive his vehicle to work, park in the parking facility, and then evaded the resulting parking fees. It is the position of the MTA that the Grievant's conduct was an intentional attempt to violate parking regulations by evading the payment of parking fees.

The MTA believes that the Grievant's termination is for just cause and that the MTA had followed a progressive discipline policy that culminated in his discharge.

UNION POSITION

The Union does not deny that the Grievant did exit the parking facility on November 25th and 26th, 2002, and did evade the payment of the parking fees. The Union believes that the MTA did not follow progressive discipline and that the Grievant's later payment of the missed parking fees constitutes a reasonable attempt to mitigate the infraction. The Union position is that the Grievant was given the ultimate punishment by being discharged and that the punishment was inappropriate to the infraction charged.

The Union contends that there was no documentation of the parking violation that took place in June of 2002, and that no warning was given to the Grievant. The Union also believes that after the June 2002 parking violation, the MTA manager did not give a formal warning to the Grievant to cease and desist evading future parking fees.

The Union contends that the Grievant's parking fee violations of November 25th and 26th, 2002 also involved two other individuals. One individual that used her parking pass to allow the other two parties to evade parking fees was given a written reprimand. The second person that evaded the parking fees was given a short-term five (5) day suspension, and the Grievant was discharged.

The Union's position is that during the time that the Grievant was going through his discharge and appeal process that the Union was handling three (3) other cases involving people that were suspended or terminated for offenses involving parking pass violations and the failure to pay parking fees. There were ten (10) employees charge in these three (3) cases and out of these employees only two (2) were discharged and their discharges were based upon timecard violations in addition to the evading of parking fees. The other employees that were charged were given punishments that were short of discharge and in most cases resulted in short-term or long term-suspensions.

The Union indicated that the following were the only formal disciplinary actions taken against TCU employees during the existence of the Gateway Building during the past ten years for parking-related violations:

> Raymond Rispress was discharged, but following an appeal, the punishment was reduced to a long-term suspension;
>
> Troy Sampson was discharged, but following an appeal, the punishment was reduced to a long-term suspension;
>
> Mr. Von Barnes was given a ten-day suspension, but following an appeal, the punishment was reduced to a five-day suspension;
>
> Stephen Johnson was given a five-day suspension and there was no appeal;
>
> Gilbert Longino was given a five-day suspension and there was no appeal;
>
> Rene Robles was given five-day suspension and there was no appeal;
>
> Edward Macon was given a ten-day suspension and there was no appeal; and
>
> Timani Middleton was given a ten-day suspension and there was no appeal.

The Union does not believe that the MTA has followed just cause or progressive discipline in their discharge of the Grievant. The Union does not believe that the punishment of discharge fits the violation. Further, the Union believes that none of the steps of progressive discipline were followed prior to the Grievant's discharge and that the discharge was disparate punishment when compared to punishments handed out to other employees for committing the same or similar offenses.

WAS JUST CAUSE FOLLOWED IN THE DISCHARGE?

A. JUST CAUSE

It is well established in labor arbitration that where, as in the present case, an employer's right to discharge or suspend an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proving that the suspension or discharge of an employee was for just cause. Therefore, the company had the burden of persuading the Arbitrator that discharge of the grievant was for just cause.

The term discipline means any punishment up to and including discharge. "Cause," "good cause," "proper cause," "sufficient cause," and so on, unless otherwise agreed, are synonymous with the term just cause. The parties to this arbitration have agreed that the issue before this arbitrator is to determine if the grievance discharge was for "proper cause", and if so, what is the remedy?

The just cause principle is normally contractual. It arises from collective bargaining agreements, individual contracts of employment, and in some jurisdictions from implied covenant of good faith and fair dealing. It may also stem from statutory protections, such as those provided to public sector employees, or in a few jurisdictions, to private sector employees.

In some situations, the just cause principles may be implied in the employees contract of employment. For example, the employer's statement in an employee handbook,

discipline policy, or other documents may establish a promise to discipline only for just cause. The parties past practice or the industrial practice may also create legitimate expectations that discipline will be only for just cause. It is clear from the testimony that while the Agreement is silent with regard to just cause, that both the Agency and the Union believe that discipline within the agency is determined by its concepts.

"Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged or disciplined. Other elements include a requirement that an employee know or reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

1. DID THE GRIEVANT VIOLATE PARKING FEE REGULATIONS?

In the present case, Grievant's own testimony leaves no doubt that he engaged in the conduct for which he was discharged. As noted in the background, during the course of his testimony at the arbitration hearing the Grievant admitted having evaded payment of parking fees in June and in November of 2002.

2. DID THE GRIEVANT REASONABLY KNOW THAT HIS CONDUCT WOULD RESULT IN DISCHARGE?

The second element of just cause is that the employee know or reasonably be expected to know ahead of time that by evading parking fees that such conduct would result in a discharge. In this case, the Grievant and Management both agreed that the Grievant did not pay parking fees in June of 2002 and that at the direction of management that he did contact the parking company and he did pay for the evaded parking fees and that he took the receipt for the parking fee to the Communication Manager. At this point there appears to be a major disagreement as to what further direction was given the Grievant, if any. Management testified that they told the Grievant to pay the fees and that they directed him to cease and desist in evading any parking fees in the future. Management did not indicate that the Grievant was told that any future violations of the parking fees would result in discharge. The Grievant, on the other hand, testified that he was given no further directions other than to pay the missed parking fees and show his payment receipt to Mr. Longsden. The Grievant testified that he was not aware that his conduct on November 25th and 26th, 2002, would result in a possible discharge and thus, he made restitution to the parking facility prior to the time that he was given notice of his discharge, thinking that he was correcting the situation as he had done in June of 2002.

From the testimony provided at the time of the hearing, there is no written documentation that would assist this arbitrator in determining what directions, if any, where given following the June parking violation. The first indication that the Grievant was told that

his conduct in November 2002 was a dischargeable offense was when he attended a hearing conducted by Ms. Diane Bojorquez. (TR 25: 24-25, TR 26:1) The reasons given the Grievant for his discharge were that he had violated the parking rules previously, and that he had been directed not to violate the parking rules again, but that he subsequently did violate those rules and failed to keep his commitment. (TR 26: 12-25, TR 27: 1-13) These reasons for the discharge were given following the violation and do not constitute adequate notice because the notice was not given prior to the alleged misconduct.

3. WAS THE DISCIPLINE ADMINISTERED EVEN HANDEDLY?

Just cause requires that an employer administer discipline even handedly. The Union contends the evidence shows discharge of the Grievant constitutes disparate treatment. The essence of a disparate treatment is differently disciplining similarly situated employees. However, administering different punishment to differently situated employees is not disparate treatment. On the contrary, if all other elements were equal, one would expect an employee who had engaged in serious misconduct to be disciplined more rigorously than one who had committed a minor transgression.

Just cause requires that there be a reasonable relationship between an employee's misconduct and the punishment imposed for that misconduct. But an arbitrator does not have unlimited discretion to substitute his or her judgment for that of management about the magnitude of a penalty given. Rather, an arbitrator must determine if the penalty imposed by management was within the bounds of reasonableness. If the arbitrator is persuaded the punishment was so excessive as to be beyond that limit, he or she not only

may, but must reduce the punishment. On the other hand, if the arbitrator is persuaded that the punishment imposed was reasonable—even if the arbitrator would have imposed a less severe punishment if he or she had the power to do so—the arbitrator must find the punishment was within the employer's managerial discretion and for just cause. In reviewing the reasonableness of punishment imposed, an arbitrator must look at all relevant circumstances including the seriousness of the offense and the employee's record.

The punishments that were handed out as a result of the November 2002 parking violation was to give one person a reprimand and a second person a short term suspension because this was their first offense. Yet the Grievant was discharged based upon a prior violation that was not treated as a violation when it occurred. There was no record keep of the June 2002 incident and there were no written directions given to the Grievant that informed him that should a similar violation occur in the future, he would be punished and maybe discharged. Having knowledge of the June violation, the management then used that undocumented violation as an opportunity to consider that incident as a first charge, and then relied upon that violation to justify the discharge after the second violation in November of 2002.

B. PROGRESSIVE DISCIPLINE AWARD LANGUAGE

Unless otherwise provided for in the Collective Bargaining Agreement, discipline for all but the most serious offenses must be imposed in gradually increasing levels. This incremental dispensing of discipline is most often referred to as "Progressive Disciple."

The primary objective of discipline is to correct rather than punish. Thus, for most offenses, employers should use one or more warnings before suspensions, and suspensions before discharge. Yet, some offenses are sufficiently serious to justify serious discipline for a first offense. These include theft, physical attacks, willful and serious safety breaches, gross insubordination, and significant violations of law on the employer's time or premises. Some Collective Bargaining Agreements list the offenses that are punishable by immediate discharge. If an Agreement is silent as to what constitutes a serious offense, the arbitrator must determine which are dischargeable offenses by using common sense, past practice, and company, industry, and societal standards.

The principle of progressive discipline benefits employers as well as employees. With positively increasing penalties, employees have an opportunity to conform their performance and conduct to the employer's reasonable expectation. Rehabilitating the employee is less expensive and less disruptive than hiring a replacement.

Mr. Longsden testified that he did not charge the Grievant or take any disciplinary action against him following the June 2002 parking fee offense. Further, Mr. Longsden testified that he did not document the offense because, as he stated in his testimony, "I didn't envision it (*the offense*) at that point in time that it was going to be leading to a progressive discipline situation." (TR 19: 19-22). Also Mr. Longsden testified that his department does use progressive discipline in determining punishment for employees that violate Agency Rules and/or Regulations. Mr. Longsden described the levels of

progressive punishments that are used as similar to that which appears in Article 18, Attendance, Section V, of the Agreement.

Under Article 18, Attendance, Section V, of the agreement, there is an outline of a five step approach entitled Discipline Guideline. The following represents the punishment for each of the five steps of the progressive discipline policy as it relates to attendance issues:

Step 1	Verbal Counseling
Step 2	Written Warning
Step 3	3 Day Suspension
Step 4	10 Day Suspension
Step 5	Termination Hearing

It was established through the testimony of both the Agency and the Union that matters relating to discipline within the Los Angeles County Metropolitan Transportation Authority are handled with progressive discipline. While the language of Article 18 deals with attendance, the concept outlined in that article clearly represents what the parties to the agreement believe to be progressive discipline, with regard to all disciplinary matters.

Ms. Bojorquez testified that Ms. Jennifer Portillo, the person with the parking pass that was party to the November 25th and 26th, 2002 parking fee situation, was disciplined by being given a written reprimand. Mr. John Evangilista, the second person that followed Ms Portillo out of the parking facility was given a five-day (5) suspension. The Grievant,

who followed Mr. Evangilista out of the parking facility, was given a discharge. Ms. Bojorquez indicated that each of the violators was given punishments based upon their work record and how management perceived the guilt of each of the individuals. Therefore, each of the individuals who participated in the same offense was given a full range of punishments that extended from a written reprimand to a discharge.

Ms. Bojorquez testified that she had conducted the first-level hearing for the Grievant, following the November parking violation, and that she discharged him following that hearing. Further, Ms. Bojorquez justified her actions by stating that the Grievant had not paid parking fees on a previous occasion and that he had been cautioned not to violate the parking rules in the future through a direct order of a manager, even though there was not record or documentation of the manager's instruction with regards to the June parking fee incident.

Had management documented the June parking fee incident and then given the Grievant a written reprimand, then they would have been following a path of progressive discipline. Yet, no record was kept of the June infraction and no record of what the Grievant was instructed to do was placed in a formal or informal written reprimand. If management had given a written reprimand to the Grievant in June of 2002, management justifiably could have imposed the next step of the progressive discipline policy on the Grievant, including discharge, depending on what written direction would have been given in the June 2002 reprimand.

Based upon the testimony of the Management witnesses and Union witnesses, it is clear that the manner in which the June offense was handled did not constitute a formal disciplinary action and that therefore, the November 25th and 26th, 2002 violations were the first time that the Grievant was given a formal disciplinary charge. Based upon the discipline handed out to the other two individuals involved in the November offense(s), the discharge of the Grievant is an excessive punishment and violates the just cause standard and progressive discipline. Since the Grievant was not properly disciplined following the June 2002 parking fee violation, then that violation cannot be considered a first violation. Therefore, the grievant should have been treated as first time offender following the November 2002 parking violations. As a first time offender, the grievant should have received punishment similar to that handed out to the other individuals involved in the November violation. Even though the June 2002 parking violation was not properly recorded and does not constitute a first offense, management could have taken that under consideration when determining appropriate punishment short of discharge. The grievant could have received a suspension similar to Evangilista because his conduct was also preplanned and purposeful instead of a discharge that he was given.

C. DISCIPLINE FOR SAFETY VIOLATION

Employees may be disciplined for violation of safety work practices. It is well-established in labor and management relations that management has the right to establish safety rules and that it may discipline workers for failure to observe those rules. In general, employees are required to avoid risk to themselves and their other workers in the

performance of their duties. Thus, employees have been disciplined for committing violent acts, careless handling of hazardous materials, horseplay, operating mobile equipment at excessive speed, and fighting among other offenses on the grounds that these actions constitute safety violations. Arbitrators recognize that management can impose discipline under general language in the collective bargaining agreement covering management rights or discipline. The employer's position is obviously strengthened when formal safety rules have been established.

The normal principles of "just cause" apply to discipline for safety violation. Arbitrators hold discipline for violation of safety rules to the same just cause standard used for other disciplinary actions. Thus, arbitrators have reduced dismissals or lengthy suspensions when the employer had not enforced safety rules consistently or when there was no history of prior discipline, even when the risk of actual injury was serious. Safety rules must be communicated to employees. Arbitrators are also reluctant to uphold discipline when there are doubts that employees are adequately informed of requirements they face.

Serious safety violations in the workplace often warrant immediate discipline. In keeping with the application of the principles of progressive discipline, the employer may dismiss employees without a previous history of discipline for serious breaches of safety rules or practices. Such breaches frequently put the employee or fellow workers at risk of their lives or physical safety.

The Agency indicated through its witnesses that the conduct of the Grievant constituted an unsafe condition in both the parking structure and on the sidewalk outside of the parking facility. Mr. Longsben testified that when a car passes through the parking gate that it crosses a traffic lane, and then proceeds up to the street-level. When exiting at a high rate of speed it is possible that other cars that are exiting the parking facility could be hit and pedestrians both in and outside of the parking structure could be hit. The Agency believes that a car speeding through the parking gate in attempt to evade parking fees constitutes a safety hazard that could have resulted in a collision between automobiles or in injury to pedestrians walking inside the parking structure or on the sidewalk outside the parking structure.

The Union expressed its concern for the safety of other workers and the safety of individuals visiting the office complex. While the Union indicated that the Grievant's conduct may have been unsafe, it questioned how unsafe the conduct was, and if it was unsafe enough to warrant an immediate discharge. Further, the Union questioned if the Grievant's conduct constituted an unsafe condition which could allow for immediate termination, why the other named individuals who participated in the November violation were not discharged but given lesser degrees of punishment? Also, the Union questioned why the Agency Management did not stop the violation following the November 25th occurrence if they were concerned about safety, but instead waited until the violation of November 26th to bring charges?

Very little evidence was presented at the time of the hearing from either the Agency or the Union regarding the issue of safety. Common sense would indicate that anyone speeding through a parking gate would create a possible unsafe condition. However, based upon the testimony at the time of the hearing, this arbitrator is unable to determine whether the conduct of the Grievant constituted an unsafe condition that would allow the agency to immediately terminate him without using progressive discipline. In the case at bar, I believe that the issue does not turn on a question of safety, but instead on the issue of progressive discipline and just cause.

While the Grievant has testified that he did violate the parking fees, there is a question as to why the Grievant has been discharged while all of the other employees who committed the same offense were given lesser punishments. While management may believe that the November offense is a second charge, the record clearly shows that the June violation was never documented nor recorded as an official violation. Therefore, the Grievant's first actual recorded violation took place in November of 2002 and, therefore, in using the standards of just cause and progressive discipline, the Grievant should have received a punishment that was less severe than discharge.

Having heard the testimony, this arbitrator believes that the conduct of the Grievant was a violation of parking facility regulations, but since it was his first documented offense, that he should have been given a suspension of not more than ten (10) days.

THE AWARD

For the reasons hereto stated, I, Daniel R. Saling, the duly appointed impartial arbitrator in this matter, do hereby find and decide that the Agency did violate the just cause and the progressive discipline standards in discharging the grievant. The Grievance's discharge is hereby reduced to a ten (10) day suspension. Further, the Grievant is to be reinstated and made whole.

For these reasons the grievance is sustained.

_____ September 17, 2003

Daniel R. Saling Date